

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On February 6, 2001 appellant, then a 56-year-old retired industrial systems specialist, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment. He indicated that he first became aware of his condition on October 27, 1985 and its relationship to his federal employment on July 1, 1990. Appellant retired on August 2, 1999.

On June 4, 2001 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Alan H. Dinesman, an otolaryngologist, for a second opinion evaluation. In a report dated June 26, 2001, Dr. Dinesman reviewed appellant's medical record and the SOAF, performed a physical examination, and completed OWCP's evaluation questionnaire. He indicated that there was no significant variation from the SOAF. Dr. Dinesman diagnosed sensorineural hearing loss in both ears and tinnitus and opined that they were due to noise exposure related to appellant's federal employment. He reviewed an audiogram conducted by an audiologist on that same date, which demonstrated losses of 25, 30, 40, and 55 decibels (dBs) on the right and 20, 25, 35, and 55 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. Utilizing the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),² Dr. Dinesman calculated that appellant had a monaural loss of 18.75 percent in the right ear and 13.125 in the left ear for a binaural loss of 14.0625 percent. He noted zero percent impairment for tinnitus.

On July 9, 2001 OWCP referred appellant's medical records and SOAF to Dr. H. Mobley, a Board-certified otolaryngologist serving as a district medical adviser (DMA), for calculation of appellant's percentage of permanent hearing impairment and assignment of the date of maximum medical improvement (MMI). In a July 9, 2001 report, Dr. Mobley noted that he reviewed the medical record and SOAF, including Dr. Dinesman's June 26, 2001 report and agreed that appellant's sensorineural hearing loss was due, at least in part, to noise-induced work-related acoustic trauma. He reviewed appellant's June 26, 2001 audiogram and applied the audiometric data to OWCP's standard for evaluating hearing loss under A.M.A., *Guides* and determined that appellant sustained a right monaural loss of 18.75 and 13.125 in the left ear and a binaural loss of 14 percent. Dr. Mobley recommended yearly audiograms, use of noise protection, and authorization for hearing aids. He determined that appellant had reached MMI on June 26, 2001, the date of the most recent audiogram and Dr. Dinesman's examination.

By decision dated September 24, 2001, OWCP accepted appellant's claim for noise-induced hearing loss.

On October 2, 2001 appellant filed a claim for a schedule award (Form CA-7).

By decision dated April 12, 2002, OWCP granted appellant 14 percent permanent impairment for binaural hearing loss. The period of the award ran from June 26, 2001 to January 7, 2002.

² A.M.A., *Guides* (5th ed. 2001).

Appellant sought treatment from Dr. Stephen Talley, a Board-certified otolaryngologist, from November 1, 2011 through August 23, 2018 who diagnosed bilateral severe high frequency sensorineural hearing loss and recommended bilateral hearing aids.

On August 28, 2018 appellant filed a Form CA-7 requesting an additional schedule award.

On September 26, 2018 OWCP referred appellant, along with a SOAF and the medical record, to Dr. William C. Smith, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss. In his October 10, 2018 otologic evaluation report, Dr. Smith reviewed the SOAF, history of injury, and the medical evidence of record. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 40, 40, 50, and 60 dBs for the right ear and 45, 50, 65, and 70 dBs for the left ear, respectively. Dr. Smith discussed appellant's hearing loss and opined that the industrial noise exposure was the primary factor causing his condition. He advised that appellant had bilateral high frequency sensorineural hearing loss and tinnitus. Dr. Smith noted that the tinnitus is in part due to noise exposure encountered during appellant's federal employment. He noted examination findings of normal canals and eardrums. Appellant reported that tinnitus interferes with his ability to hear conversations, but does not provide any limitations in sleep, reading, tasks requiring concentration, or enjoyment of quiet recreation. Dr. Smith diagnosed bilateral sensorineural hearing loss and tinnitus due to noise exposure encountered in appellant's federal civilian employment. Utilizing the sixth edition of the A.M.A., *Guides*,³ he calculated that appellant sustained a right monaural loss of 34.5 percent and left monaural loss of 49.5 percent and a binaural hearing loss of 37 percent. Dr. Smith provided a one percent impairment for tinnitus, which was only heard in a quiet environment, very easily masked, and did not interfere with his sleep or daily activities. He therefore found a total of 38 percent binaural hearing loss. Dr. Smith recommended appellant continue to wear hearing aids.

On October 24, 2018 OWCP referred the medical record and SOAF to Dr. Jeffrey Israel, a Board-certified otolaryngologist serving as an OWCP DMA, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On October 24, 2018 Dr. Israel reviewed Dr. Smith's examination report and agreed that appellant's sensorineural hearing loss was due, at least in part, to noise-induced work-related acoustic trauma. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the A.M.A., *Guides* and determined that appellant sustained a right monaural loss of 33.75 percent, a left monaural loss of 48.75 percent and a binaural hearing loss of 36.3 percent. Dr. Israel averaged appellant's right ear hearing levels of 40, 40, 50, and 60 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 47.5. After subtracting out a 25 dB fence, he multiplied the remaining 22.5 balance by 1.5 to calculate a 33.75 percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 45, 50, 65 and 70 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 57.5. After subtracting out a 25 dB fence, he multiplied the remaining 32.5 balance by 1.5 to calculate a 48.75 percent left ear monaural hearing loss. Dr. Israel then calculated 36.3 percent binaural hearing loss by multiplying the right ear loss of 33.75 percent by five, adding the 48.75 percent left ear loss, and dividing this sum by six. He recommended yearly audiograms, use

³ A.M.A., *Guides* (6th ed. 2009).

of noise protection, and authorization for bilateral hearing aids. Dr. Israel noted some discussion of tinnitus in the records and its impact on the activities of daily living. He added one percent to the 36.3 binaural loss, appellant would receive a total award of 37.3 percent. Dr. Israel noted that his impairment rating was close to that of Dr. Smith, but differed. He determined that appellant had reached MMI on October 10, 2018, the date of the latest audiogram in the records and the one used by Dr. Smith to determine the current hearing impairment.

On January 17, 2019 OWCP requested that Dr. Smith review the October 24, 2018 impairment rating from the DMA and indicate whether he concurred with his opinion, and if not to provide specific reasons for disagreement in a narrative report.⁴

On February 8, 2019 OWCP referred appellant, along with a SOAF and the medical record, to Dr. John D. Edwards, a Board-certified otolaryngologist serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss. In his March 8, 2019 otologic evaluation report, Dr. Edwards reviewed the SOAF, history of injury, and the medical evidence of record. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 40, 45, 55, and 60 dBs for the right ear and 50, 50, 65, and 70 dBs for the left ear, respectively. Dr. Edwards discussed appellant's hearing loss and opined that the industrial noise exposure was the primary factor causing his condition. He advised that appellant had bilateral high frequency sensorineural hearing loss and bilateral tinnitus. Dr. Edwards noted that the tinnitus was in part due to noise exposure encountered during appellant's federal employment. He noted examination findings of normal canals and eardrums. Appellant reported that tinnitus did not bother him significantly and did not keep him from sleeping. Dr. Edwards diagnosed bilateral sensorineural hearing loss and bilateral tinnitus due to noise exposure encountered in appellant's federal civilian employment. Utilizing the A.M.A., *Guides*, he calculated that appellant sustained a right monaural loss of 37.5 percent and left monaural loss of 51 percent and a binaural hearing loss of 39.75 percent. Dr. Edwards provided one percent impairment for tinnitus noting that it was only heard in a quiet environment, very easily masked, and did not interfere with sleep or daily activities. He noted 40.75 percent binaural hearing impairment. Dr. Edwards recommended appellant continue to wear hearing aids.

On April 17, 2019 OWCP referred the medical record and SOAF to Dr. Israel, serving as OWCP's DMA, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On April 22, 2019 Dr. Israel reviewed Dr. Edwards' examination report and agreed that appellant's sensorineural hearing loss was due, at least in part, to noise-induced work-related acoustic trauma. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the A.M.A., *Guides* and concurred with Dr. Edwards' impairment calculation. Dr. Israel determined that appellant sustained a right monaural loss of 37.5 percent, a left monaural loss of 50.625 percent and a binaural hearing loss of 39.7 percent. He indicated that Dr. Edwards provided a one percent tinnitus award to the binaural hearing loss. Dr. Israel opined that there was no discussion of tinnitus in the records or its impact on appellant's activities of daily life. Nonetheless, he added one percent impairment to the 39.7 binaural loss resulting in a total 40.7 percent binaural hearing loss.

⁴ In a memorandum dated April 17, 2019, OWCP indicated that Dr. Smith was no longer available to provide a supplemental report in this matter. As a result, the case was sent for a new medical examination.

On August 23, 2019 OWCP requested that Dr. Edwards review the April 22, 2019 impairment rating from the DMA and provide further details regarding the impact of tinnitus on appellant's activities of daily living.

On August 26, 2019 OWCP referred appellant, along with a SOAF and the medical record, back to Dr. Edwards serving as a second opinion physician, regarding the nature, extent, and causal relationship of his hearing loss. In his September 10, 2019 otologic evaluation report, Dr. Edwards noted that appellant underwent another audiogram on September 10, 2019. Testing at the frequencies of 500, 1,000, 2,000, and 3,000 Hz revealed losses at 40, 45, 55, and 75 dBs for the right ear and 50, 50, 60, and 70 dBs for the left ear, respectively. Dr. Edwards discussed appellant's hearing loss and opined that the industrial noise exposure was the primary factor causing his condition. He advised that appellant had bilateral high frequency sensorineural hearing loss and bilateral tinnitus. Dr. Edwards noted that appellant complained of bilateral tinnitus three to four days a week, it keeps him from sleeping at times, but it does not interfere with normal daily activities. He opined that the tinnitus is in part due to noise exposure encountered during appellant's federal employment. Dr. Edwards diagnosed bilateral sensorineural hearing loss and bilateral tinnitus due to noise exposure encountered in appellant's federal civilian employment. Utilizing the A.M.A., *Guides*, he calculated that appellant sustained a right monaural loss of 44 percent and left monaural loss of 50 percent and a binaural hearing loss of 45 percent. Dr. Edwards provided two percent impairment for tinnitus, mild, easily masked by environmental sounds and easily forgotten with activities, may occasionally interfere with sleep, but not daily activities. He noted 47 percent binaural hearing loss. Dr. Edwards recommended that appellant continue to wear hearing aids.

On October 16, 2019 OWCP again referred the medical record and SOAF to Dr. Israel, serving as OWCP's DMA, to determine the extent of appellant's hearing loss and permanent impairment due to his employment-related noise exposure. On October 21, 2019 Dr. Israel reviewed Dr. Edwards' September 10, 2019 examination report and agreed that appellant's sensorineural hearing loss was due, at least in part, to noise-induced work-related acoustic trauma. He applied the audiometric data to OWCP's standard for evaluating hearing loss under the A.M.A., *Guides* and determined that appellant sustained a right monaural loss of 43.125 percent, a left monaural loss of 48.75 percent and a binaural hearing loss of 44.3 percent. Dr. Israel averaged appellant's right ear hearing levels of 40, 45, 55, and 75 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 53.75. After subtracting out a 25 dB fence, he multiplied the remaining 28.75 balance by 1.5 to calculate a 43.125 percent right ear monaural hearing loss. Dr. Israel then averaged appellant's left ear hearing levels of 50, 50, 60 and 70 dBs at 500, 1,000, 2,000, and 3,000 Hz, respectively, by adding the hearing loss at those four levels then dividing the sum by four, which equaled 57.5. After subtracting out a 25 dB fence, he multiplied the remaining 32.5 balance by 1.5 to calculate a 48.75 percent left ear monaural hearing loss. Dr. Israel then calculated 44.3 percent binaural hearing loss by multiplying the right ear loss of 43.13 percent by five, adding the 48.75 percent left ear loss, and dividing this sum by six. He again noted minimal discussion in the records with regard to the impact of tinnitus on the activities of daily living, but added 2 percent tinnitus award to the 44.3 percent binaural hearing loss for a total award of 46.7 percent. Dr. Israel determined that appellant had reached MMI on September 10, 2019, the date of the latest audiogram in the records and the one used by the Dr. Edwards to determine the current hearing impairment.

On October 22, 2019 OWCP requested that the DMA, Dr. Israel, consider that appellant was previously paid a schedule award for 14 percent binaural hearing loss and determine what impairment rating appellant would be due at this time.

On October 28, 2019 the DMA indicated that he previously calculated a total of 46.1 percent hearing loss, which included binaural hearing loss of 44.1 percent and 2 percent for tinnitus. He opined that appellant's past binaural hearing loss award of 14 percent should be considered as part of the award rendered on October 21, 2019. The DMA's revised calculation found that appellant would be entitled to an additional award of 32.1 percent binaural hearing impairment.

On November 13 and 21, 2019 OWCP requested that the DMA provide a supplemental opinion on whether appellant incurred additional employment-related hearing loss after he retired in 1999, in addition to the 14 percent binaural hearing loss paid, or whether this additional hearing loss was age related or of another cause.

On November 26, 2019 Dr. Israel noted that it was impossible to determine the percentage of hearing loss that can be attributed to presbycusis, work-related acoustic trauma, and hobby or life activity noise. He assumed that at least some of the noise exposure and subsequent hearing loss was due to work-related noise hazards. Dr. Israel further noted that it was established by otolaryngologist experts that hearing loss related to hazardous noise exposure may continue after the exposure stops. He noted that the progression of hearing loss occurs as a result of the initial noise exposure whether acute or over time. Dr. Israel opined that while we may not understand the mechanism of how work-related hearing trauma might impact hearing loss after retirement into the later years, he believed there was a causal relationship. He advised that, while appellant did not sustain direct work-related acoustic trauma after retirement, it was very possible that the incited acoustic trauma received prior to retirement could be playing an additive role to his progressive hearing loss. Dr. Israel further opined that the schedule award rendered in his prior report should stand.

By decision dated December 9, 2019, OWCP granted appellant a schedule award for 46.1 percent binaural hearing loss with bilateral tinnitus. It noted that he was previously paid a schedule award for 14 percent binaural hearing loss on April 15, 2002 and would be entitled to an additional award of 32 percent. The period of the award ran from September 10, 2019 through November 30, 2020.

On January 13, 2020 appellant requested reconsideration. In an accompanying statement dated January 7, 2020, he disagreed with OWCP's December 9, 2019 decision. Appellant asserted that he was exposed to hazardous noise, which caused hearing loss and ringing in his ears preventing him from obtaining a job after he retired from the Federal Government. He believed that he was eligible for financial compensation for his life time.

In support of his request, appellant submitted a January 7, 2020 statement from his daughter, D.R. D.R. indicated that her father was exposed to loud noises during his federal employment, which caused progressive hearing loss. She indicated that his hearing loss prevents him from understanding conversations with others and from spending quality time with his grandchildren. Appellant also submitted a January 7, 2020 letter from his wife, Y.G., who indicated that appellant was unable to hear very well even with his hearing aids. Y.G. noted that

she must be with him at all times because he is unable to hear people speaking or sounds while he is driving.

By decision dated February 25, 2020, OWCP denied modification of its prior decision finding that appellant had no more than 46.1 percent binaural hearing loss with bilateral tinnitus.

By letter dated March 31, 2020, appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated April 29, 2020, OWCP denied his request for a hearing, finding that he was not entitled to a hearing as a matter of right because he had previously requested reconsideration of his claim. It exercised its discretion, and determined that the underlying issue could equally well be addressed by requesting reconsideration and submitting probative new evidence in support of appellant's claim for an increased schedule award.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provisions of FECA⁵ and its implementing regulations⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.⁹ With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.¹⁰

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.¹¹ Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are averaged. Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* point out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ *D.H.*, Docket No. 20-0198 (issued July 9, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

¹⁰ *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

¹¹ A.M.A., *Guides* 250.

everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss of hearing is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss, and the total is divided by six to arrive at the amount of binaural hearing loss.¹² The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.¹³

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.¹⁴ If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.¹⁵

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish more than 46 percent binaural hearing loss, for which he previously received schedule award compensation.

OWCP referred appellant to Dr. Edwards for a second opinion examination to evaluate his hearing loss. In his September 10, 2019 report, Dr. Edwards discussed appellant's work history and opined that the industrial noise exposure was the primary factor causing his condition. He diagnosed bilateral high frequency sensorineural hearing loss and bilateral tinnitus caused by the noise exposure in his workplace.

On October 21, 2019 the DMA reviewed Dr. Edwards' reports and indicated that testing at the frequency levels of 500, 1,000, 2,000, and 3,000 Hz revealed dB losses of 40, 45, 55, and 75 for the right ear and dB losses of 50, 50, 60 and 70 for the left ear, respectively. Following the rating protocols, the DMA properly calculated a total binaural hearing loss of 46.1 percent.

The Board finds that the DMA accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions which comported with his findings, and with the appropriate provisions of the A.M.A., *Guides*.¹⁶ The DMA's report therefore carries the weight of the medical evidence and establishes that appellant has 46.1 percent binaural hearing loss which, in accordance with OWCP's policy, is rounded down to 46 percent.¹⁷

¹² *Id.*

¹³ *G.T.*, Docket No. 19-1705 (issued April 16, 2020); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

¹⁴ *See A.M.A., Guides* 249.

¹⁵ *Id.*

¹⁶ *See J.M.*, Docket No. 18-1387 (issued February 1, 2019).

¹⁷ *See F.T.*, Docket No. 16-1236 (issued March 12, 2018). The policy of OWCP is to round the calculated percentage of impairment to the nearest whole number. Results should be rounded down for figures less than 0.5 and up for 0.5 and over. *See R.M.*, Docket No. 18-0752 (issued December 6, 2019); *V.M.*, Docket No. 18-1800 (issued April 23, 2019); *J.H.*, Docket No. 08-24329; *Robert E. Cullison*, 55 ECAB 570 (2004).

On appeal, appellant asserts that he sustained permanent and measureable hearing loss and should be compensated for that loss for the rest of his life. As explained above, he has not established greater permanent impairment than that which was previously awarded. Furthermore, the amount payable pursuant to a schedule award does not take into account the effect that the impairment has on employment opportunities, wage-earning capacity, sports, hobbies or other lifestyle activities.¹⁸ Appellant may file a claim for compensation (Form CA-7) for any disability from work causally related to the accepted employment injury.

The Board therefore finds that appellant has not met his burden of proof to establish that he has more than 46 percent binaural hearing loss, for which he received schedule award compensation.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b) of FECA, concerning a claimant's entitlement to a hearing, states that: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his or her claim before a representative of the Secretary."¹⁹ Section 10.615 of OWCP's federal regulations, implementing this section of FECA, provides that a claimant who requests a hearing can choose between two formats, either an oral hearing or a review of the written record by an OWCP hearing representative.²⁰ As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.²¹ The date of filing is fixed by postmark or other carrier's date marking.²²

The Board has held that OWCP, in its broad discretionary authority in the administration of FECA, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and that it must exercise this discretionary authority in deciding whether to grant a hearing.²³ Specifically, the Board has held that OWCP has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of the 1966 amendments to FECA which provided the right to a hearing,²⁴ when the request is made after the

¹⁸ *Ruben Franco*, 54 ECAB 496 (2003).

¹⁹ 5 U.S.C. § 8124(b)(1).

²⁰ 20 C.F.R. § 10.615.

²¹ *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *Ella M. Garner*, 36 ECAB 238, 241-42 (1984).

²² 20 C.F.R. § 10.616(a).

²³ *T.A.*, *supra* note 21; *Marilyn F. Wilson*, 52 ECAB 347 (2001).

²⁴ *C.A.*, Docket No. 17-0944 (issued May 15, 2018); *Rudolph Bermann*, 26 ECAB 354, 360 (1975).

30-day period for requesting a hearing,²⁵ when the request is for a second hearing on the same issue,²⁶ and when the request is made after a reconsideration request was previously submitted.²⁷ In these instances, OWCP will determine whether a discretionary hearing should be granted or, if not, will so advise the claimant with reasons.²⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's March 31, 2020 request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

Appellant's March 31, 2020 hearing request was made after he had previously requested reconsideration of OWCP's denial of his claim for an increased schedule award. The Board notes that on January 13, 2020 he requested reconsideration of OWCP's December 9, 2019 merit decision regarding his schedule award. By decision dated February 25, 2020, OWCP denied modification of the December 9, 2019 schedule award. Consequently, the Board finds that he was not entitled to a hearing as a matter of right as he had previously requested reconsideration.²⁹

While OWCP also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, OWCP, in its April 29, 2020 decision, properly exercised its discretion by considering appellant's request and finding that the issue could be equally well addressed through the submission of a reconsideration request with evidence supporting his claim for an increased schedule award. The Board has held that as the only limitation on OWCP's authority is reasonableness, abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.³⁰ In the present case, the evidence of record does not indicate that OWCP committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion.³¹

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish greater than 46 percent binaural hearing loss for which he previously received schedule award compensation. The Board further finds that OWCP properly denied appellant's request for an oral hearing pursuant to 5 U.S.C. § 8124(b).

²⁵ *Herbert C. Holley*, 33 ECAB 140, 142 (1981).

²⁶ *Johnny S. Henderson*, 34 ECAB 216, 219 (1982).

²⁷ *R.H.*, Docket No. 07-1658 (issued December 17, 2007); *S.J.*, Docket No. 07-1037 (issued September 12, 2007). Section 10.616(a) of OWCP's regulations provides that the claimant seeking a hearing must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision. 20 C.F.R. § 10.616(a).

²⁸ *C.A.*, *supra* note 24; *Rudolph Bermann*, *supra* note 24.

²⁹ *Johnny S. Henderson*, *supra* note 26.

³⁰ *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

³¹ *Supra* note 24.

ORDER

IT IS HEREBY ORDERED THAT the April 29 and February 25, 2020 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 12, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board